Ismail Khan J.: The appellant was ordered by the learned President, Sessions Court, Seremban, to give up vacant possession of the front half of the ground floor of premises No. 135, Paul Street, Seremban, to the respondent, and to pay costs. Against this order he appealed. He also made an application to the learned President for a stay of execution pending the appeal but this application was refused. This appeal is against this refusal of the learned President to grant a stay of execution.

Mr. George for the respondent raised the preliminary objection that the step taken by the appellant in appealing against the refusal of the stay of execution is not warranted by any rule of procedure. He referred to Order 59, rule 12, which reads as follows:—

"An appeal shall not operate as a stay of execution under the decision appealed against except in so far as the Court appealed from or the High Court may order, and any application for stay shall be made in the first instance to the Court appealed from."

The Court below and the High Court have therefore a co-ordinate jurisdiction to entertain an application for a stay of execution but as regards the High Court, while it has an independent jurisdiction to stay proceedings, pending an appeal, it is not to exercise that independent jurisdiction until an application has been made to the same effect and decided upon in the Court below. The reason for this is that the High Court and the Court below may not, to use the words of Brett, M.R. in the case of *Cropper* v. *Smith*, [1] at page 308, "incur the risk of deciding in different ways as to staying proceedings without either of them knowing of the application to the other." It is clear that on the refusal by the learned President of the application for a stay of execution the only other course open to the appellant would have been to apply to this Court in its original jurisdiction for a stay. Therefore, where a special procedure is prescribed, as in this case, by an application to the High Court to grant a stay of execution of a judgment in the Court below, pending appeal, I am not prepared to say that an entirely different step taken to achieve that object, as it has been done in this case by appealing against the refusal for a stay of execution by the Court below, is a curable irregularity. I have no power to convert an appeal into an application. I am reminded of Lord Herschell's judgment in *Smurthwaite* v. *Hannay*, [2] at page 501, where his Lordship in speaking of a joinder of plaintiffs which is not authorised by the rules of procedure observed: "If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity." In fact, in my opinion, the step taken by the appellant by way of an appeal is an illegality and I may say at once that Order 70, rule 1 has no application.

I have no doubt it will be competent for the appellant to apply to this Court again in proper proceedings.

This appeal is dismissed with costs.

Appeal dismissed.

PENANG YELLOW BUS CO. v. RURAL DISTRICT COUNCIL

[A.C.J. (Rigby J.) June 27, 1961]

[Penang — Civil Appeal No. 4 of 1961]

Appeal — Local Authority — Municipal assessment — Municipal Ordinance (S.S. Cap. 133), s.68(3) — Condition precedent.

On a preliminary point raised as to whether the conditions laid down in section 68(3) of the Municipal Ordinance were a necessary condition precedent to an appeal lying or being effectively constituted,

Held: the appeal is not properly before the Court by reason of the non-compliance with the provisions of section 68(3) at the time the Notice of Appeal was lodged and that no appeal, therefore, in fact lies.

Case referred to:—

(1) *Semantan Estate (1952) Ltd.* v. *Collector of Land Revenue* [1960] M.L.J. 300.

CIVIL APPEAL.

Lim Huck Aik for the appellant.

Eusoffe Abdoolcader for the respondent.

Rigby J.: This is an appeal brought by the Penang Yellow Bus Co. Ltd. against the Rural District Council, Penang Island, in respect of the assessment of the annual value relating to premises owned by the appellants, for the year 1960. A preliminary point has been taken by Mr. Eusoffe Abdoolcader on behalf of the respondent and both Mr. Eusoffe Abdoolcader and Mr. Lim Huck Aik, who appears for the appellants, have asked for a decision to be given on the preliminary point raised at this stage, and have agreed that in the event of the preliminary point so raised being unsuccessful, the appeal should be adjourned to another date for expert evidence to be given. The point taken by Mr. Eusoffe Abdoolcader is that having regard to the provisions of section 68(3) of the Municipal Ordinance the appeal is not properly before the Court and no appeal in fact lies by reason of the non-compliance by the appellants with conditions precedent laid down in that section to an appeal being constituted or lying. Section 68(3) of the Municipal Ordinance provides that:—

"No appeal shall lie against any assessment if the assessment being due is unpaid....."

It is contended by Mr. Eusoffe Abdoolcader that having regard to the provisions of sections 59(3) and 399(9) of the Ordinance and the notification thereunder, the assessment due in fact remained unpaid at the time the Notice of Appeal was lodged in this Court.

For purposes of the argument before me the brief facts of the case are that by a Notice dated the 2nd October, 1959, and given under the provisions of section 62(3) of the Municipal Ordinance, the appellants were informed that the Assessment List for the year 1960 "will contain a revised annual value of $66,000 on their premises." The previous annual value had, in fact, been $53,100. The appellants objected to that revision in accordance with the provisions of section 62(4) of the Ordinance, and their

objection was heard on the 10th December, 1959. By a letter dated the 12th January, 1960, the appellants' solicitors were informed by the Secretary of the Rural District Council in the following terms:—

"That this Council has confirmed the approval for the annual value of the abovementioned premises to stand at $66,000 with effect from the 1st January, 1960."

Now section 59(3) of the Municipal Ordinance provides that:—

"Such rate or rates shall endure for any period not exceeding twelve months, and shall be payable half-yearly in advance, without demand....."

By section 399 of the Ordinance the Governor is empowered to create Rural Boards, and by section 399(9) he is empowered to direct whether the rates and taxes shall be payable yearly or half-yearly. The Rural District Council was created by the Governor under that Ordinance, and by virtue of Penang *Gazette* Notification No. 42 of 1929, it was provided that rates should be payable yearly in advance at the District or Land Office of the district. Subsequent notifications have not in any way affected that direction. It is, therefore, the argument of Mr. Eusoffe Abdoolcader that a condition precedent to the institution of this appeal had not been complied with in that on the receipt of the letter dated the 12th January, 1960, the appellants knew that their appeal against the assessment had been dismissed and they knew, or ought to have known, that by virtue of sections 59(3) and 399(9) the rates payable were required to be paid in advance, and that it was a condition precedent to an appeal lying that the unpaid rates be so paid in accordance with section 68(3). Whilst I have considerable sympathy with the appellants there is no doubt in my mind that that contention is a valid one. I am satisfied that the conditions laid down in section 68(3) were a necessary condition precedent to an appeal lying or being effectively constituted. The following passage in Willway's *Quarter Sessions Practice*, at pages 131-132, seems to me directly in point:—

"In all cases, whether under the summary jurisdiction Acts or otherwise, certain conditions precedent must be fulfilled before the Court to which the appeal is brought can assume jurisdiction to try it.....

.....

Further, the condition as to the giving and serving of notices of appeal, and as to recognisances or other security for prosecution of the appeal, must be meticulously observed. Particularly in criminal cases the respondent often raises no objection to the inadequacy or irregularity of notices or other formalities, but even when no objection is raised by either party the Court itself must take an objection which goes to the root of the matter, because to try an appeal when, for instance, the notice is out of time, is to purport to exercise jurisdiction when no jurisdiction exists."

In the case of *Semantan Estate (1952) Ltd.* v. *Collector of Land Revenue*,[1] Ong J. on a preliminary objection being taken that certain requirements had not been complied with prior to the reference of a matter to the Court under the Land Acquisition Enactment, following the decision of the Judicial Committee of the Privy Council in an Indian appeal, quoted therefrom:—

"Wherever jurisdiction is given to a Court by an Act of Parliament.....and such jurisdiction is only given upon certain specified terms.....it is the universal principle that these terms must be complied with, in order to create and raise the jurisdiction, for if they be not complied with the jurisdiction does not arise."

Mr. Lim Huck Aik submitted that the words, "No appeal shall lie" mean only that no appeal shall be heard by the Court. He contends that the condition required under the particular subsection has been complied with if in fact—as in this case—the rates due have been paid before the appeal was actually heard, and that that is sufficient. With respect, I am unable to accept this contention. In my view the words, "No appeal shall lie" mean that one of the conditions necessary for the effective institution of the appeal, that is to say, payment of the assessed rates due, must be complied with before the Notice of Appeal is lodged within the statutory period prescribed in the subsection. Then Mr. Lim Huck Aik submitted that the letter dated the 12th January, 1960, from the respondents' solicitors does not contain any notification that the assessment of rates has been increased, but merely states that the earlier decision of the Rural District Council to increase the annual value has been confirmed, and he seeks to make a distinction between the annual value and assessment of rates and submits that no notice of the increase in rates payable has been given to the appellants as required by section 62(3) of the Ordinance. Again, with respect, I see nothing in this argument. It is quite clear that the assessment of rates itself is based upon the annual value of the premises in question. The appellants were notified that it was intended to revise the annual value and they appeared before the Rural District Council, through counsel, for the purpose of objecting to the assessment consequent upon that revision of the annual value. Their objections were heard in accordance with section 63(1) which relates to the hearing of objections against the assessment or revision thereof. It is quite clear that that notification of the 12th January, 1960, was a notification to the appellants that the increased assessment, as decided by the Rural District Council, has been confirmed after the objection of the appellants had been duly considered.

For these reasons I am of the opinion, and I so decide, that this appeal is not properly before the Court by reason of the non-compliance with the provision of section 68(3) at the time the Notice of appeal was lodged and that no appeal, therefore, in fact lies. The appeal must accordingly be dismissed with costs. Costs to be taxed and allowed on the higher scale.

Appeal dismissed.

Solicitors: *Lim Huck Aik & Co.; Presgrave & Matthews.*